

Denver Journal of International Law & Policy

Volume 40
Number 1 *40th Anniversary Edition*

Article 12

April 2020

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Recommended Citation

Larry D. Johnson, Palestine's Admission to UNESCO: Consequences within the United Nations, 40 Denv. J. Int'l L. & Pol'y 118 (2011-2012).

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PALESTINE'S ADMISSION TO UNESCO: CONSEQUENCES WITHIN THE UNITED NATIONS?

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BACKGROUND

On October 31, 2011, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) voted to admit Palestine as its 195th Member State. The vote was 107 in favour, 14 against with 52 abstentions. Among those voting against was the United States, which issued a press statement that the vote was "regrettable" and "premature" and undermined the "shared goal of a comprehensive, just, and lasting peace in the Middle East."¹ The statement also stated that while the U.S. would maintain its membership and commitment to UNESCO, Palestinian membership triggered longstanding legislative restrictions which compelled the United States to refrain from making contributions to UNESCO. Palestine's admission to UNESCO membership was effected by its signature and deposit of its instrument of acceptance of the Constitution of UNESCO on November 23, 2011, at the National Archives of the United Kingdom, the depositary of the Constitution.

Palestine had applied for membership in the United Nations on September 23, 2011.² In November 2011, the Security Council's Committee on the Admission of New Members concerning the application of

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1. Press Statement, U.S. Dep't of State, Palestinian Admission to UNESCO (Oct. 31, 2011), *available at* <http://www.state.gov/r/pa/prs/ps/2011/10/176418.htm> (by Victoria Nuland).

2. U.N. Secretary-General, Application of Palestine for Admission to Membership in the United Nations, Note by the Secretary-General, U.N. Doc. A/66/371 (Sept. 23, 2011). The covering Note by the Secretary-General transmitting Palestine's application to the General Assembly made no reference to the receivability of the application. In 1993, when Macedonia submitted its application for membership, the covering Note stated that the Secretary-General was circulating the application "following informal consultations held by the President of the Security Council at the request of the Secretary-General concerning the receivability" of the application. U.N. Secretary-General, Admission of New Members to the United Nations, Note by the Secretary-General, U.N. Doc. A/47/876 (Jan. 22 1993). It remains to be seen in the Palestinian case whether it can be argued that by circulating the application without such consultations and lacking a "without prejudice to receivability" clause, the Secretary-General had concluded, at least *prima facie*, that the application was receivable as having been submitted by a "State."

Palestine submitted its report.³ The report indicates that the Committee considered, *inter alia*, whether Palestine met the criteria for statehood, was a peace-loving State, and was willing and able to carry out the obligations contained in the Charter. Its Chair, in summing up the debate, stated that the Committee was unable to make a unanimous recommendation to the Security Council. As of the writing of this comment, no further action has been taken in the Council regarding Palestine's application.

This comment will not survey the various repercussions of Palestine's admission to UNESCO membership in general nor its efforts to become a member of the UN. Rather, it surveys several ways in which the membership of Palestine in UNESCO might have consequences within the United Nations. The three main areas where there might be consequences are: a) observer State status in the General Assembly, b) participation as a State in United Nations conferences and meetings and c) deposit of treaty instruments with the Secretary-General as depositary of treaties.

a) Observer State status in the General Assembly

Neither the Charter nor the rules of procedure of the General Assembly refers to observers. Allowing non-members to observe and participate in the meetings of the Assembly arose purely from practice and ad hoc decisions of the Assembly.⁴

As far as "standing" invitations to intergovernmental organizations and other entities to participate in the work and sessions of the General Assembly, this is always done by specific decision of the General Assembly. More than 80 such organizations and entities have received such standing invitations.

With regard to non-member States, the Secretary-General's practice of providing observer "facilities" began in 1946 when Switzerland was provided such facilities. This unforeseen development was reported by the Secretary-General to the General Assembly in a 1949 report, which noted that four non-member States (Austria, Italy, the Republic of Korea and Switzerland) had appointed observers to follow the work of the organization at its headquarters. The Secretary-General stated in the report that he had welcomed the observers and that he had given their missions every possible facility "though their status [had] not yet

3. U.N. S.C. Rep. of the Committee on the Admission of New Members Concerning the Application of Palestine for Admission to Membership in the United Nations, U.N. Doc. S/2011/705 (Nov. 11, 2011).

4. Observer status is not accorded in the United Nations in general, but rather in particular organs such as the General Assembly. For a summary of the development of non-member participation and observation as of 1978, see Erik Suy, *The Status of Observers in International Organizations*, in 160 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 75, 75-180 (1978).

been determined.”⁵ The Assembly did not react and has never systematically dealt with non-Member State observers. As stated in a 1994 legal opinion, “[i]n the case of observer States, the General Assembly does not take any action; rather it is the Secretary-General who provides observer facilities to non-Member States which establish permanent offices at Headquarters.”⁶

The “facilities” accorded to such observers in the Assembly were basically a nameplate and seat at the rear of the meeting room, separated from Member States. Observers also receive access to unrestricted documents as well as access to open meetings of the Assembly, its Main Committees and subsidiary bodies.⁷ As far as any right to participate in meetings, such as making speeches, interventions and the like, “[t]he function of an observer is defined by his title, that is his role is essentially to ‘observe’. . . he may not automatically take part in the discussion.”⁸ Rather, the observer made statements only after making a request to the presiding officer who consults with the body whether to grant the request (normally speaking after Member States). In the practice of the Assembly in the early years, requests of observer States to speak were normally limited to speaking in the Main Committees of the Assembly, not in the plenary, and were granted by Committees if the observer State had a direct and immediate interest in the matter under discussion.⁹

It may be noted here that this is in contrast to the practice that began in the 1970s by which organizations, which by virtue of Assembly decision had been given a standing invitation to participate, began speaking in the plenary on matters of direct concern to them. Observer States soon followed to a limited extent, but in each instance, the President of the Assembly would consult the Assembly by informing its members that he or she had received a request from the non-Member State observer to make a statement and if there were no objections, he would grant the request and give the Permanent Observer the floor.¹⁰

Over the years, over a dozen non-Member States establishing offices at Headquarters have been provided observer facilities.¹¹ But in

5. U.N. Secretary-General, *Permanent Missions to the United Nations: Report of the Secretary-General*, ¶ 14, U.N. Doc. A/939/Rev.1 (Sept. 12, 1949).

6. 1994 U.N. Jurid. Y.B. 463, U.N. Doc. ST/LEG/SER.C/33.

7. This article will not deal with the question of the privileges and immunities to be accorded to observer States at Headquarters.

8. 1972 U.N. Jurid. Y.B. 159, U.N. Doc. ST/LEG/SER.C/10.

9. 1974 U.N. Jurid. Y.B. 178, U.N. Doc. ST/LEG/SER.C/12.

10. 1978 U.N. Jurid. Y.B. 166, U.N. Doc. ST/LEG/SER.C/16 (noting that until 1975, no observer State had made a statement in the plenary other than Pope Paul VI in 1965, but that beginning in 1975 and 1976, the Assembly granted requests from some observer States to speak in the plenary).

11. Austria, Bangladesh, Democratic People's Republic of Korea, Democratic Republic of Viet Nam, Finland, German Democratic Republic, Germany, Federal Republic of, Holy

providing such facilities, the Secretary-General had to make a judgment whether the entity concerned was in fact a State. He made that judgment on the basis of the following:

. . . [T]he Secretary-General is not in a position to alone decide whether or not a given entity possesses all the attributes of a sovereign State acting on the international plane. It has therefore been established by a practice which goes back to the 1950s that the decisive criterion for determining whether or not an entity is a 'State' for purposes of according observer State facilities is whether or not the applicant in question has been admitted as a member State of one of the specialized agencies of the United Nations.¹²

If that is the "decisive criterion," Palestine would seem well placed to simply request observer State facilities of the Secretary-General. But in doing so, it could lose the considerable rights and privileges it has obtained over the years first as a national liberation organization and then as an "entity." Through a series of resolutions adopted by the Assembly beginning in 1974, Palestine has been granted various rights and privileges which observer States relying solely on facilities granted by the Secretary-General do not enjoy. Indeed, as indicated by a legal opinion in 2000, "Palestine now enjoys several of the rights and privileges of participation otherwise exclusively enjoyed by States Members of the United Nations."¹³ He stressed, however, that those "enhanced" rights did not affect the legal status of Palestine.

Because of the disparity between the rights of Palestine by virtue of Assembly decision and the facilities provided by the Secretary-General alone, observer States began to consider the benefits of having an Assembly resolution according them the same or similar rights as enjoyed by Palestine. This is indeed what occurred in 2004, when the Assembly accorded to the Holy See, the sole remaining observer State, "enhanced" rights of participation. These rights were not quite as extensive as those enjoyed by Palestine, but they were certainly more than what it had enjoyed during the previous 30 years by virtue of the Secretary-General's "facilities."¹⁴

See, Italy, Japan, Kuwait, Monaco, Republic of Korea, Spain, Switzerland and Viet Nam. As of this writing, only the Holy See remains as a non-Member State observer.

12. 1994 U.N. Jurid. Y.B. 463, U.N. Doc. ST/LEG/SER.C/33. Presumably, the Secretary-General would also accord such facilities to non-Member States who are parties to the Statute of the International Court of Justice (ICJ). See "the Vienna formula" discussion *infra* Part B.

13. 2000 U.N. Jurid. Y.B. 361, U.N. Doc. ST/LEG/SER.C/38.

14. G.A. Res. 58/314, U.N. Doc. A/RES/58/314 (July 1, 2004). The preamble noted that the Holy See had become a Permanent Observer State at the United Nations on April 6, 1964 (by virtue of a decision by the Secretary-General).

Thus, while Palestine might request the Secretary-General to be accorded the facilities of a non-Member State observer by virtue of its admission to UNESCO and the application of the "decisive criterion" noted above, what would it gain and what would it risk? Unless the Secretary-General declined to follow the established practice, he would simply move the nameplate "Palestine" next to "Holy See" and thereby indicate that Palestine would be considered a non-Member State observer for purposes of observer State facilities in the Assembly. Presumably, this would be to Palestine's political advantage, but could pose risks of losing the "enhanced" rights of participation, which have only been accorded by virtue of Assembly decision. It would be doubtful if the Secretary-General would take it upon himself to conclude that the Assembly-conferred "enhanced" rights of Palestine as an entity could be transferred by his acting alone without Assembly involvement to Palestine as a non-Member State observer.

This returns to the speculation prior to the UNESCO admission that Palestine would seek a General Assembly decision acknowledging, noting, welcoming, or considering Palestine to be an independent, sovereign State on the international plane.¹⁵ In addition, such a resolution would presumably also "grandfather" or "roll over" the rights and privileges that Palestine had enjoyed as an entity to the rights and privileges that it would enjoy as an observer State.

So while in theory, the admission of UNESCO could have an almost automatic consequence in the UN in terms of the Secretary-General providing, on Palestine's request, non-Member State observer facilities, in all likelihood that would not be the preferred choice of action in view of the risks of losing its considerable rights and privileges in the Assembly. A separate, distinct resolution adopted by the Assembly would most probably be sought.

b) Participation as a State in United Nations conferences and meetings

United Nations conferences and meetings may be open not only to members of the Organization, but also to other States, presumably to

15. The Palestinian National Council proclaimed the "State of Palestine" in November 1988 but the General Assembly has never formally recognized this designation. See G.A. Res. 43/177, U.N. Doc. A/RES/43/177 (Dec. 15, 1988) (noting that the General Assembly "acknowledged" the proclamation, but it chose not to opine on the status of Palestine in the UN. Rather, it decided that the designation "Palestine" should be used in place of that of "Palestine Liberation Organization" within the UN without prejudice to the observer status and functions of the PLO). See also Question of Palestine, U.N. Doc A/44/L.50 (Nov. 29, 1989) (proposing a draft resolution circulated by the Arab States under which the Assembly would have decided that the designation "Palestine" should be construed within the UN "as the State of Palestine"); U.N. GOAR, 44th Sess., 76th mtg. at 2-5, U.N. Doc. A/44/PV.76 (Dec. 6, 1989) (noting that the sponsors decided not to press the draft resolution to a vote).

advance universality of participation of members of the international community, particularly in the drafting and adoption of treaties or instruments aimed at universal adherence. For example, in 1966, when the Assembly decided to convene the Vienna Conference on the Law of Treaties, it invited "States Members of the United Nations, States members of the specialized agencies, States Parties to the Statute of the International Court of Justice and States that the General Assembly decides specially to invite" to participate.¹⁶ The "core" of the invitation (States members of the UN or of the specialized agencies and Parties to the Statute of the ICJ, if not already covered by the prior two categories) subsequently became known as the "Vienna formula." A later example is the 1997 General Assembly resolution convening the Rome Conference on the Establishment of an International Criminal Court, which invited "all States Members of the United Nations or members of the specialized agencies" to participate.¹⁷ An even more recent example is the 2009 decision to establish a Preparatory Committee for the 2012 Conference on Sustainable Development (Rio + 20) with the "full and effective participation of all States Members of the United Nations and members of the specialized agencies."¹⁸

The Assembly also on occasion has employed the expression "all States" with regard to a conference or meeting. In 1973, the Assembly requested that "all States" communicate views regarding the World Disarmament Conference¹⁹ and that "the Governments of all States" keep the Assembly informed of their disarmament negotiations.²⁰ The 1973 legal opinion explaining how the Secretariat would interpret that language said that the reference to "all States" was to be understood as referring to States members of the United Nations, of the specialized agencies or the International Atomic Energy Agency (technically not a specialized agency), States parties to the Statute of the ICJ and entities which the General Assembly unequivocally considers to be States.²¹ In 2000, a legal opinion stated that the phrase "open to all States Members of the United Nations or members of the specialized agencies or of the

16. G.A. Res. 2166 (XXI), ¶ 4, U.N. Doc. A/RES/2166(XXI) (Dec. 5, 1966).

17. G.A. Res. 52/160, ¶ 3, U.N. Doc. A/RES/52/160 (Dec. 15, 1997). By 1997, all Parties to the Statute of the ICJ were also members of the UN, hence there was no need to include that category of invitees.

18. G.A. Res. 64/236, ¶ 23, U.N. Doc. A/RES/64/236 (Dec. 24, 2009).

19. G.A. Res. 3183 (XXVIII), U.N. Doc. A/RES/3183(XXVIII) (Dec. 18, 1973).

20. G.A. Res. 3184 (XXVIII) C, U.N. Doc. A/RES/3184(XXVIII)C (Dec. 18, 1973).

21. 1974 U.N. Jurid. Y.B. 158, U.N. Doc. ST/LEG/SER.C/12. In its invitation formula for the Third UN Conference on the Law of the Sea, the Assembly invited States members of the UN or of the specialized agencies/IAEA, parties to the Statute of the ICJ, and two specifically named States not covered in the previous categories (Guinea-Bissau and Democratic Republic of Viet Nam). See G.A. Res. 3067 (XXVIII), U.N. Doc. A/RES/3067(XXVIII) (Nov. 16, 1973).

International Atomic Energy Agency" was known as the "all States formula."²²

In these circumstances, it is clear that should a United Nations conference or meeting be open to the full participation of States members of the specialized agencies or of "all States," Palestine should be among the invitees and should participate fully and equally with State members of the UN or of specialized agencies (seated between Palau and Panama).²³

This possibility may have been the reason behind the invitation formula used for the upcoming "Rio + 20" Conference on Sustainable Development, scheduled to take place in Brazil in June 2012. As indicated above, States invited in 2009 to participate in the Preparatory Committee for that Conference included both members of the UN and members of the specialized agencies. In his August 2011 report on preparations for the Conference, the Secretary-General recommended to the Assembly that it "decide that the Conference shall be open to all States Members of the United Nations and States members of the specialized agencies, with the participation of observers, in accordance with the established practice of the General Assembly and its conference, and in accordance with the rules of procedure of the Conference."²⁴ However, when the Second Committee of the Assembly was presented a draft resolution on the upcoming Conference on November 10, 2011, approximately 10 days after the October 31st vote on the admission of Palestine to UNESCO, the invitation formula did not follow the Secretary-General's recommendation, but rather provided that "the conference . . . will be open to participation by all States Members of the United Nations, the Holy See, in its capacity as Observer State, Palestine, in its capacity as observer, and the European Union, in its capacity as an observer, as well as other intergovernmental organizations . . ."²⁵ This text, which clearly differentiated the position of the Holy See as an "Observer State" from that of Palestine as an "observer," was adopted without a vote by the Assembly in the plenary on December 22, 2011 as resolution 66/197.

22. 2000 U.N. Jurid. Y.B. 349, U.N. Doc. ST/LEG/SER.C/38.

23. Some governments may not consider Palestine to be a State member of UNESCO, but as far as UNESCO is concerned, it is.

24. U.N. Secretary-General, Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development: Report of the Secretary-General, ¶ 120(f), U.N. Doc. A/66/287 (Aug. 9, 2011).

25. U.N. Gen. Assembly Second Comm., Sustainable Development: Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the Outcomes of the World Summit on Sustainable Development: Report of the Second Committee, at 15, U.N. Doc. A/66/440/Add.1 (Dec. 13, 2011).

Thus, two entities considered by specialized agencies to be States members (Holy See and Palestine) are limited to observer participation, and the text differentiates the Holy See as an "Observer State" whereas Palestine is an "observer." Moreover, two other States members of specialized agencies but not members of the United Nations, which are also Pacific Small Island States (the Cook Islands, Niue), are excluded altogether.²⁶ This change in the invitation practice of UN Conferences may have had as its object avoiding having to face the question of inviting Palestine as a full participant in the Conference by virtue of its admission of UNESCO. This may well be the first consequence in the United Nations of the admission of Palestine as a member of UNESCO.²⁷

c) Deposit of treaty instruments with the Secretary-General as depositary of treaties

The Secretary-General serves as depositary for numerous multilateral treaties, recording signatures and the deposit of treaty instruments indicating consent of a State to be bound by a treaty (ratification, accession, acceptance). Many such treaties provide final clauses which mirror the "Vienna formula" or the "all States" clauses noted above, when setting out which States are entitled to sign the text and deposit treaty instruments concerning the treaty.

The Vienna Convention on the Law of Treaties of 1969 follows the expanded form of the Vienna formula by providing that it shall be open to signature and deposit of treaty instruments by members of the United Nations and of the specialized agencies, parties to the Statute of the ICJ and to any other State invited by the Assembly to become a party to the Convention. In reference to treaties open to treaty action by "all States" or "any State," the Secretary-General has interpreted those phrases to mean the same as the "Vienna formula."²⁸ Thus, as a member of a specialized agency, Palestine should be entitled to sign or deposit treaty instruments related to any such treaty. The number of treaties to which this would apply are too numerous to mention,²⁹ but

26. G.A. Res. 66/197, U.N. Doc. A/RES/66/197 (Dec. 22, 2011). This is in contrast to the 1992 Rio Conference on Environment and Development, at which States members of specialized agencies participated equally with UN members (e.g., the Holy See). See G.A. Res. 45/211, U.N. Doc. A/RES/45/211, ¶ 7 (Dec. 21, 1990). The Holy See also attended various UN conferences as a full, equal participant, including the Beijing Women's Conference and the Cairo Conference on Population and Development.

27. As long as there is disagreement concerning the status of Palestine within the Assembly, there may not be further invitations along the "Vienna formula" or "all States" lines unless adopted by a vote.

28. Treaty Section of the U.N. Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties at 22-23, U.N. Doc. ST/LEG/7/Rev.1 (1999).

29. See *id.* Some multilateral treaties are not deposited with the Secretary-General but rather with governments, such as various disarmament treaties (deposited with the

concern has been expressed regarding the possibility of Palestine depositing a treaty instrument to become a party to the Rome Statute of the International Criminal Court (ICC), which is open for the deposit of instruments of accession by "all States."

The situation is complicated, however, by the fact that in January 2009, Palestine invoked article 12(3) of the Rome Statute in lodging with the ICC a declaration accepting the jurisdiction of the Court "for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since July 1, 2002." That provision of the Rome Statute allows States not Parties to the Rome Statute to lodge acceptances of jurisprudence with retroactive effect. The Prosecutor of the ICC indicated the declaration would be carefully studied, including whether the declaration of acceptance met statutory requirements.

Thus, Palestine appears to have a choice between becoming a State party to the Rome Statute by depositing an instrument of accession based on its 2011 admission to UNESCO as a member State, or waiting for the result of the Prosecutor's study of the 2009 declaration of acceptance of jurisdiction as a non-State party, applied retroactively. It should be noted, somewhat counterintuitively, that if Palestine were to become a State Party to the Rome Statute, the ICC would only come into force for Palestine on the first day of the month following the 60th day following the deposit of its instrument of acceptance; no retroactive application is possible in line with standard law of treaties principles. But if it maintained its declaration of acceptance of jurisdiction lodged as a non-State Party, jurisdiction might extend retroactively to the date indicated in its application, July 1, 2002.

Of course, if the Prosecutor were to conclude that the declaration was receivable as having been lodged by a State and as meeting the requirements of the Statute at the time it was lodged, he or she would still have to determine how far back in time jurisdiction would begin, i.e., to the date claimed in the Declaration, to some later time when it was determined that Palestine had achieved statehood, or to the date of Palestine's admission in UNESCO. This would entail an interesting and not-free-from-difficulty analysis, initially on the part of the Prosecutor.³⁰ As of the end of January 2012, it is not known whether the admission of Palestine to UNESCO membership will have an impact on the Prosecutor's study of the declaration.

In general, treaties that are open to the deposit of treaty instruments by States members of specialized agencies should be available to

Russian Federation, United Kingdom, and United States) and the four 1949 Geneva Conventions on the Protection of Victims of War (deposited with Switzerland).

30. See Yael Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities*, 8 J. INT'L CRIM. L. 3, 3-27 (2010).

Palestine as a member State of UNESCO, according to the established practice as described above. In this, as was the case with the other possible consequences, the Secretary-General is spared having to do anything automatically, but can wait an external event — in this case an explicit attempt on the part of Palestine to deposit a treaty instrument. If, for policy or other reasons not discussed here, Palestine decides to forgo taking that action for the time being, the Secretary-General will not be placed in a position of having to choose between established and settled treaty depositary practice and political pressure not to take any action which could be perceived as taking a decision on his own regarding whether or not Palestine is a State on the international plane.

CONCLUSION

In all three circumstances described above, some future external event must occur before the consequences of UNESCO membership would “kick in” at the United Nations: a) a resolution adopted by the General Assembly deeming Palestine to be a non-Member State observer while maintaining its “enhanced” rights of participation; b) invitations issued by the Assembly to “all States” or to States members of specialized agencies, to participate in UN conferences or meetings; and c) Palestine attempts to deposit treaty instruments with the Secretary-General regarding treaties open to “all States” or to States members of specialized agencies.